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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1218

VIOLA ROGERS, Guardian, et al,
Petitioners,

v.

RAY GARDNER FLYING SERVICE, INC., et al,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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February 26, 1971.

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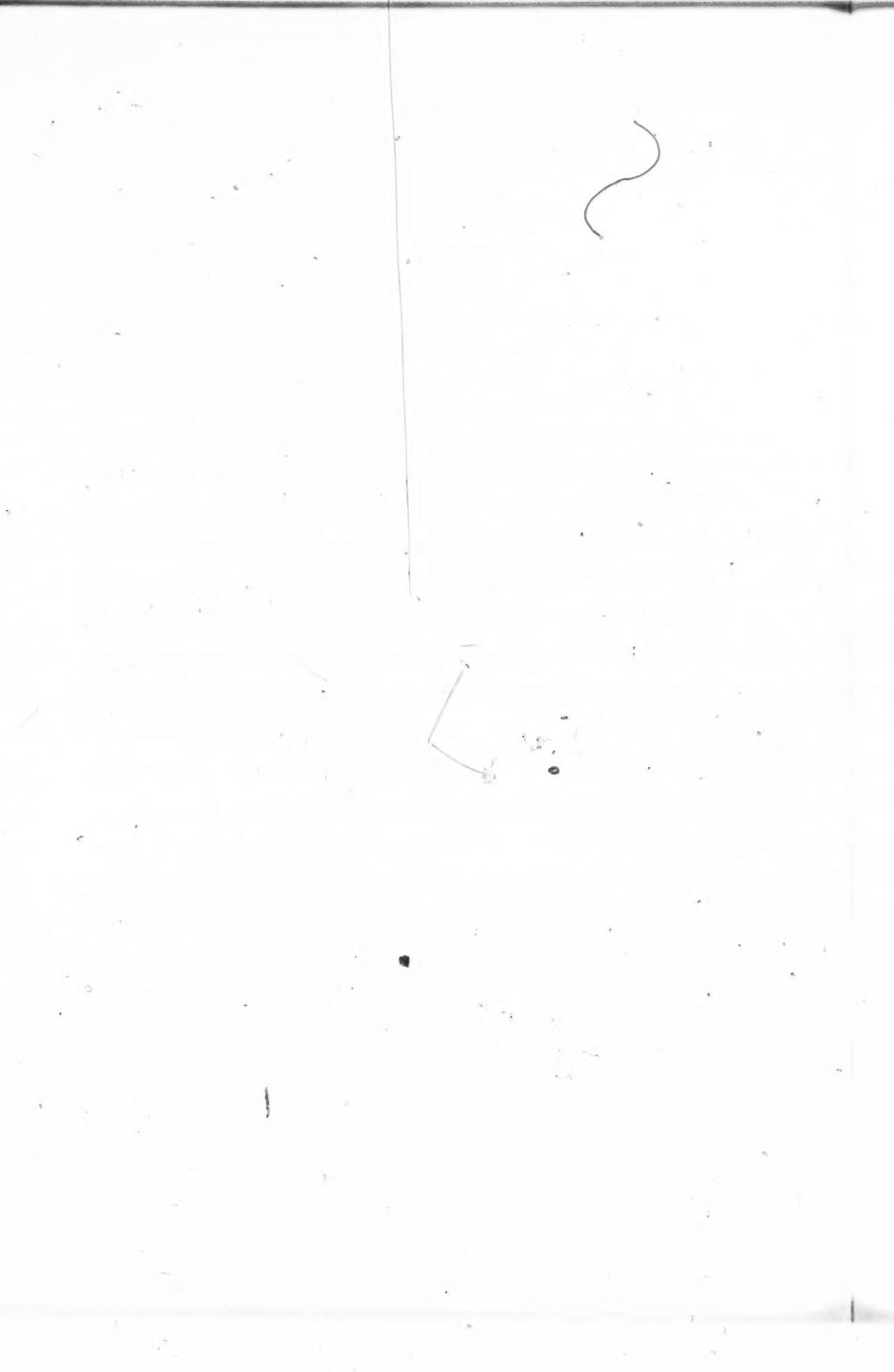

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RESPONDENTS' BRIEF IN OPPOSITION

To the Supreme Court of the United States:

STATUTE INVOLVED

The statute involved in this case is definition no. 26 in the Federal Aviation Act, *49 U.S.C. § 1301 (26)*. It was among the definitions in the original Civil Aeronautics Act of 1938, and was brought forward into the new statute without change when the Civil Aeronautics Act was replaced by the Federal Aviation Act in 1958. The definition reads as follows:

> "As used in this chapter, unless the context otherwise requires —
>
> * * * *
>
> "(26) 'Operation of aircraft' or 'operate aircraft' means the use of aircraft, for the purpose of air

navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter."

STATEMENT OF THE CASE AND QUESTION PRESENTED

This is an action for damages for wrongful death arising out of the crash of a private plane in Oklahoma. Jurisdiction is predicated entirely upon diversity of citizenship. Although the case comes from a Texas federal district court, it is agreed that Oklahoma law applies.[1]

Petitioners' decedents were passengers killed in the crash. The sole cause of the crash was the negligence of the pilot, but petitioners have not sued the pilot (who was the husband of one decedent and the brother-in-law of the other)[2]; rather, they have sued the lessors, respondents, from whom the pilot had rented the

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[1]Texas, in wrongful death cases, follows the law of the place of the tort. *Marmon v. Mustang Aviation, Inc.*, *430 S.W. 2d 182 (Tex. Sup., 1968)*.

[2]The pilot was Gordon Hunter, a licensed pilot. Passengers were his wife and his wife's sister, Ella Dunn. They had rented the plane in Wichita Falls, Texas, had flown from Wichita Falls to Arkansas, and were returning to Wichita Falls when the crash occurred near Ardmore, Oklahoma. Everyone on board was killed. Plaintiffs-petitioners, Mr. and Mrs. Rogers, citizens of Arkansas, were the parents of Mrs. Hunter and Mrs. Dunn; they brought suit individually, and Mrs. Rogers sued as guardian of Mrs. Hunter's minor children by a prior marriage. (R. 1-2; Deposition of Mrs. Rogers 4.)

aircraft.'

Since petitioners do not claim that respondents were in any way negligent, and do not claim that the pilot was respondents' agent, petitioners concede, as they must, that they have no cause of action against respondents under Oklahoma law: the Supreme Court of that state has squarely held that the non-negligent bailor of an aircraft is *not* liable for the negligence of the bailee. *Spartan Aircraft Co. v. Jamison, 181 Okl. 645, 75 P. 2d 1096 (1938)*; see Opinion below 4. Petitioners, therefore, are seeking to create a right of recovery against respondents under federal law. Their sole theory—as they frankly admit, the "single thrust" of their case (Petition for Writ of Certiorari 4)—is that they may impute the pilot's negligence to respondents, and thus recover damages from respondents, by virtue of definition no. 26 (" 'operation of aircraft' or 'operate aircraft' ") in the Federal Aviation Act, *49 U.S.C. § 1301 (26)*, quoted at pp. 1-2 hereof. In short, petitioners here seek damages from respondents on the theory that in 1938, when Congress inserted this definition in the

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'Respondents-defendants are Ray Gardner Flying Service, Inc., which is a fixed base operator in Wichita Falls, and Ray Gardner, president of that corporation. The plane was owned by Les V. Wilson, Jr., who had leased it to Ray Gardner Flying Service, Inc., by written agreement. Ray Gardner Flying Service, Inc., in turn, rented the plane to Gordon Hunter under an oral agreement. (R. 8; Deposition of Ray Gardner 7.) Wilson, the owner, originally was a defendant in the case but was dismissed by plaintiffs. (R. 5.) Mr. Gardner, individually, apparently is in the suit on the theory that the corporation is his alter ego. He would deny any such relationship, if necessary, but the point is not material in the present status of the case.

Civil Aeronautics Act, Congress intended thereby to preempt the field of tort liability in airplane ballments, to overturn the rule existing in Oklahoma and the great majority of states, and to impose upon all the states a federal rule that the non-negligent bailee of an aircraft is liable for the negligence of the bailee.

Although petitioners, in the Fifth Circuit, filed three briefs on original submission and one brief on rehearing, their theory failed to persuade any member of the Court. The panel which heard the case (Judges Gewin, Simpson, and Morgan) were not convinced "that Congress would undertake to alter the tort laws of numbers of states in such an oblique fashion" (Opinion 10), and, so, unanimously rejected petitioners' theory; the same panel unanimously denied petitioners a rehearing, and the Court unanimously denied them a rehearing en banc.[1]

The question before the Supreme Court, in this damage suit, is whether certiorari will be granted to review petitioners' theory.

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[1] The case had reached the Fifth Circuit on respondents' interlocutory appeal, under 28 U.S.C. § 1292(b), from the order of the district court overruling respondents' motion to dismiss this suit. (R. 4, 5, 11, 12) The district court entertained this preliminary theory of contributory negligence on the sole ground of liability then asserted by petitioners against respondents. (R. 5) The Fifth Circuit, on appeal, has upheld the district court and ordered that judgment be rendered for respondents.

ARGUMENT

This argument will submit that the Fifth Circuit was clearly right in refusing to accept petitioners' theory, that such decision easily withstands all the attacks made upon it in the Petition for Writ of Certiorari, and that, accordingly, there is no reason for the decision to be reviewed by this Court.

A. The language and context of the definition.

In testing petitioners' contention that Congress, in 1958, intended for a definition in the Civil Aeronautics Act to preempt the field of tort liability in airplane collisions and establish a federal rule that the negligence of an aircraft bailee will be imputed to a non-negligent bailee, we begin with the following considerations, which petitioners cannot dispute and have never attempted to dispute in any court.

1. In virtually all the states, the common law rule is, and always has been, that a "bailor is not liable to third persons for their injuries resulting from the bailee's negligent use of the thing bailed." *8 C.J.S.*, "Bailments," § 49, p. 479 *(1952)*. This is the rule in Oklahoma, whose law applies to our case. *Spartan Aircraft Co. v. Jamison, 181 Okl. 645, 75 P. 2d 1052 (1938)*.

2. As to injuries sustained by passengers, this common law rule was the rule which, as of 1938, the Commissioners on Uniform State Laws were proposing for adoption by the states in § 6 of the Uniform Aero-

vention Act.[1] As of 1939, the legislatures of 32 states had adopted § 6 of the Uniform Act[2]; such statutes are in effect today in 19 states.[3]

3. No doubt, under the Commerce Clause, Art. I, § 8, cl. 3, Congress could overturn all these state laws

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[1] § 6 of the Uniform Act provided that the owner of an animal killed by dogs, or damage caused by the animal, or its servants or the owner, if the owner was, at the time of the killing or damage, in charge of the animal, or was in charge of the premises where the damage was done, or was in charge of the animal when the damage was done, or was in charge of the animal when the animal was killed, was liable for the damage, unless the animal was killing or doing damage to dogs, poultry, or livestock on the premises of the owner of the animal, or on the premises of the person in charge of the animal, or on the premises of the person in charge of the animal when the animal was killed, or unless the animal was killing or doing damage to dogs, poultry, or livestock while the animal was in pursuit of trespassing dogs, poultry, or livestock of the owner of the animal, or of the person in charge of the animal, or of the person in charge of the animal when the animal was killed, or unless the animal was killing or doing damage to dogs, poultry, or livestock while the animal was in immediate pursuit of the animal from the premises where the animal was killing or doing damage to dogs, poultry, or livestock. An animal which is not the property of any person, or which is the property of the owner of the premises where the animal is killing or doing damage to dogs, poultry, or livestock, or of the person in charge of the premises when the animal is killing or doing damage to dogs, poultry, or livestock, or of the person in charge of the animal when the animal is killing or doing damage to dogs, poultry, or livestock, or which is the property of the owner of the animal killed, or of the person in charge of the animal killed, or of the person in charge of the animal when the animal was killed, is considered to be owned by the person who harbors or keeps the animal.

[2] § 7 (Damages in Case of Killing)—The liability of the owner of any animal, or the owner of premises thereon, or the person in charge of the animal or premises, for damages caused by worrying, killing or injuring any dog, poultry or livestock, is determined by the rule of [the applicable state or local law]." (11 Uniform Laws Ann. 390-391.)

Vermont, Delaware, Georgia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Ohio, South Dakota, Tennessee, Utah, Virginia, and Wisconsin. See 11 Uniform Laws Ann., pocket part, p. 11 (1966).

Vermont Stat. Ann. § 3-3-3; Delaware Code Ann. Title 3 § 3-3-3; Georgia Code Ann. § 11-3-3; Missouri Rev. Stat. § 3-3-3; Idaho Code § 25-3-3; Maryland Ann. Code Art. 11 § 3; Minnesota St. Ann. § 3-3-3(1); Missouri Ann. St. § 3-3-3; Nevada Rev. St. § 3-3-3; New Jersey St. Ann. § 3-3-3; North Carolina Gen. St. § 3-3-3; North Dakota Code Code § 3-3-3; Pennsylvania (Purdon's) St. Ann. Title 3 § 3-3-3; South Carolina Code of Laws § 3-3-3; South Dakota Comp. Laws § 3-3-3; Tennessee Code Ann. § 3-3-3; Vermont St. Ann. Title 6 § 3-3-3; Wisconsin St. Ann. § 3-3-3.

and establish a federal statutory rule that the holder of an aircraft is liable, without fault, for the holder's negligence, but before the courts will hold that Congress has done this, it must be shown that preemption "was the clear and manifest purpose of Congress." See *Rice v. Santa Fe Elevator Company*, 331 U.S. 218, 230 (1947), and the other authorities cited at footnote 7 of the opinion below. Particularly is this so when, as here, it is claimed that Congress has preempted state rules of tort, an area which "has historically been left to the states." (Opinion 10.) See *Carroll v. Lanza*, 349 U.S. 408, 413 (1955); *Collins v. American Radiator, Inc.*, 350 U.S. 630, 631 (1956).

4. The definition upon which petitioners rely certainly does not say that it is intended to preempt or even affect state rules of tort; on the contrary, the definition appears to be operative only within the confines of the "chapter" which is now the Federal Aviation Act (and formerly was the Civil Aeronautics Act). The statute specifies, as it has since its inception in 1938, that the definition applies "as used in this chapter" and "within the meaning of this chapter." 49 U.S.C. § 1301 (26).

5. Indeed, the "chapter" in which the definition appears is not even a tort statute; the Civil Aeronautics Act-Federal Aviation Act is "an administrative measure, limited to the regulation of the operation of aircraft in the interest of public safety." *Southeastern Aviation,*

Inc. v. Hurd, 289 Penn. 630, 335 S.W. 2d 435, 440 (1952), app. dism., 371 U.S. 31 (1962). Many courts have observed that, as said in *Volinski v. Worley*, 204 F. Supp. 679 (E.D.Va., 1962):

> "Implying a civil remedy for damages would appear to be clearly foreign to the Congressional purpose for enactment of the Act." (204 F. Supp. 681.)

Moreover, the statute itself has the following proviso, 49 U.S.C. § 1506:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Against this undisputed background, we may focus on the theory which petitioners urge on this Court. In 1938—at a time when the states, in the exercise of their traditional power over the domain of torts, had long since established the common law rule that a bailor is not liable for the bailee's negligence; at a time when the Commissioners on Uniform State Laws were advocating that the common law rule be adopted by express statute in cases of damage sustained by airplane passengers; at a time when 22 states had enacted such statutes; at a time when Congress well knew that it

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Vermont Power v. Southeastern Airlines, Inc., 232 F. Supp. 2 (D.S. Penn., 1964); Williams v. Occidental Corporation Co., 171 F. Supp. 305 (E.D. Va., 1959); Hardy v. McDonnell, 180 F. Supp. 84 (N.D. Miss., 1960); Chesney v. Braniff, 208 F. Supp. 466 (W.D. Wis., 1962); Randall v. Western Airlines, Inc., 207 F. Supp. 661 (D. Colo., 1962).

"will never be held" that Congress intends to supersede state law "unless its purpose to effect that result is clearly manifested," *Reid v. Colorado*, 187 U.S. 137, 148 (1902)—Congress said, in a regulatory and administrative act:

> "As used in this chapter • • • Any person who owns or authorizes the operation of aircraft • • • in the capacity of owner, lessee, or otherwise • • • shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter."

What petitioners want this Court to do is to grant certiorari and hold that at that time, under those circumstances, and by that language, it was the clear and manifest purpose of Congress to say:

> "In an action for death or injury to a passenger a bailed aircraft, brought under the laws of one of the several states, the bailee shall be liable to the plaintiffs for the negligence of the bailee, any statute, policy, or rule of decision of that state to the contrary notwithstanding."

Merely to state petitioners' position is to raise this obvious question: if Congress intended to enact a rule that bailees shall be liable for the negligence of the bailee, why did not Congress simply say so? Petitioners have never tried to answer this question in any court, nor have they ever cited any instance in which Congress has undertaken to preempt state laws by what the Fifth Circuit aptly calls "the circuitous reasoning plaintiffs find themselves driven to employ." (Opinion 8.)

It appears, in fact, that, on the relatively few occasions when Congress has decided to alter state tort rules, Congress has been careful to make its intent known in clear and unambiguous language. An example is the Carmack Amendment, *49 U.S.C. § 20 (11)*. In most states, the common law is that, absent special contract, the initial carrier is liable to the shipper only for safe carriage over its own lines; its responsibility ends upon delivery of the goods to a connecting carrier. See *Inland Waterways Corp. v. Standard Commercial Tobacco Co., 65 F. 2d 715, 717 (6 Cir., 1933)*. In 1906, Congress decided that, for interstate shipments, it would make the initial carrier responsible for the shipment all the way to destination, thus affording the shipper the right to sue the initial carrier for all damage and leaving the latter to obtain recoupment for damage done on the lines of the connecting carrier. *Missouri, K. & T. Ry. Co. v. Ward, 244 U.S. 388 (1917)*. The Carmack Amendment, making this change, did not rely upon any definition in a regulatory statute; rather, it explicitly said that the initial carrier "shall be liable" to the shipper for damage to the property "caused by it or by any common carrier * * * to which such property may be delivered." *49 U.S.C. § 20 (11)*. Another example, this one from the aviation field, is the Warsaw Convention: intending to override state laws and require international air carriers to assume the burden of disproving negligence on their part in passenger injury cases, the treaty says that the carrier "shall be

liable" for passenger injury but "shall not be liable" if it can prove freedom from fault. Warsaw Convention, Arts. 17, 20, 49 Stat. 3000, 3018-3019 (1934). Conversely, as the Fifth Circuit observed (Opinion 11), and as will be discussed in more detail at pp. 18 to 22 of this Brief, when Congress, in 1948, intended to supersede the statutes of 19 states and exempt mortgagees of aircraft from the vicarious liability for ground damage imposed by such statutes, Congress expressed this intent by saying that: "No person having a security interest in • • • any civil aircraft • • • shall be liable" for damage caused by such aircraft "on the surface of the earth." *49 U.S.C.* § *1404*. Surely, then, if Congress had intended to impose federal vicarious liability upon aircraft bailors (reversing the common law and nullifying 22 state statutes in the process), Congress would have explicitly said that the bailor "shall be liable" to persons injured by the bailee's negligence, or would have used some other direct, unambiguous phraseology. Congress would not have depended upon a definition in a regulatory act—let alone in a regulatory act which disclaims any purpose to "abridge or alter the remedies now existing at common law or by statute." *49 U.S.C.* § *1506*.

When definition no. 28 (" 'operation of aircraft' and 'operate aircraft' "), relied upon by petitioners, is read in context, it is quite plain that Congress had no thought of using it to change the bailment laws of the several states. The definition, as the statute twice says, applies

within the "chapter" which constitutes the Federal Aviation Act: the definition is that "as used in this chapter" one who allows his aircraft to be operated by another "shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter." The "chapter" makes it unlawful to operate an unregistered aircraft or an aircraft not eligible for registration, *49 U.S.C.* §1401(a), to operate an aircraft for which there is not currently in effect an airworthiness certificate, *49 U.S.C.* §1430(a)(1), to operate as an air carrier without an air carrier operating certificate, *49 U.S.C.* §1430(a)(4), to operate aircraft in air commerce in violation of any F.A.A. rule, regulation, or certificate, *49 U.S.C.* §1430(a)(5), or to operate a United States ens plane or other aircraft on the high seas in contravention of federal regulations. *49 U.S.C.* §1430(a)(6). Violations are subject to a civil penalty of $1,000.00 for each such violation, and the aircraft is subject to a lien for the penalty. *49 U.S.C.* §1471. Moreover, the "chapter" provides that aggrieved persons may file complaints with the Agency, *49 U.S.C.* §1482, that the Administrator may reinspect aircraft and reexamine airmen and may amend, suspend, or revoke certificates and licenses, whether for equipment or personnel, *49 U.S.C.* §1429, and that the Board or Administrator may apply for injunctive relief against violations of the "chapter" or the regulations promulgated thereunder. *49 U.S.C.* §1487.

Clearly, then, in providing that a bailor is operating an aircraft "within the meaning of" and as the term is "used in" the Federal Aviation Act, what Congress intended, as the Fifth Circuit says, "was to subject the classes of persons named in Title 49, Sec. 1301 (28), equally with pilots to the rules, regulations, and penalties provided *in the Federal Aviation Act*." (Opinion 8, emphasis the court's.) Petitioners have shown nothing in the language or the context of the definition which will admit of any other construction.

B. The legislative history.

Petitioners say, however, that the intent on the part of Congress, for the definition of "'operation of aircraft' or 'operate aircraft'" to impose various vicarious liability upon aircraft bailors, is "clearly" revealed by the "congressional history of the Federal Aviation Acts." (Petition for Writ of Certiorari 8.) We submit that, on the contrary, it is precisely this "congressional history" which shows beyond question that Congress has never considered that the definition had any such effect.

At the outset, it is to be noted that petitioners' "congressional history" does not extend back to 1926 when the definition was enacted,[1] nor does it include any statement by any member of Congress which even begins to support petitioners' theory. The reason is

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[1] President Roosevelt signed the Civil Aeronautics Act on June 23, 1938. 52 Stat. 937, 1029 (1938).

that no such history exists. As we pointed out in our "Appellants' Reply to Brief for Appellees" in the Fifth Circuit (pp. 4-9 and the appendices thereto), and as petitioners have not denied, it appears that, in all the discussions which preceded the adoption of the Civil Aeronautics Act, the definition of "'operation of aircraft' or 'operate aircraft'" was never debated at all—not on the floor of Congress, not in the committee reports, not even, so far as could be determined, in any contemporary literature. If petitioners are correct in their interpretation of this definition, then Congress established a federal rule of vicarious liability, reversed the universal common law rule, and nullified the Uniform Aeronautics Act and 22 state statutes, without even once discussing the subject."

Petitioners do not challenge this point. They do not rely upon any direct expression of congressional intent—in 1938 or at any other time. All their "congressional history" consists of is a species of backward reasoning by petitioners, predicated on petitioners' own misquotation of a 1948 amendment to the Civil Aeronautics

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"One of the persons most actively engaged in drafting the Civil Aeronautics Act was Mr. Charles E. Rhyne, later president of the American Bar Association. After the statute was enacted, Mr. Rhyne published a treatise, *The Civil Aeronautics Act Annotated, With the Congressional History Which Produced It, and the Precedents Upon Which It Is Based (Nat'l Law Book Co., 1939)*. Mr. Rhyne's purpose was to show from the legislative history of the statute "what Congress intended to accomplish by the enactment of each provision thereof." *Ibid.*, p. x. He included a discussion of what he regarded as the "most important" definitions in the Act—the definitions of "air carrier," "air commerce," and "air transportation." *Ibid.*, p. 71. Surely, a definition which established federal vicarious liability of bailors and overturned 22 state statutes would have been included in Mr. Rhyne's list of "important" definitions, but Mr. Rhyne did not mention the definition of "'operation of aircraft' or 'operate aircraft'" anywhere in his treatise.

Act. They presented the same argument—and the same misquotation—to the Fifth Circuit.

Petitioners say that this 1948 amendment was designed to relieve security owners-bailors from the vicarious liability which, petitioners claim, was imposed upon bailors by the original Civil Aeronautics Act. Therefore, petitioners conclude, Congress must have considered that it had created such liability by the definition of "'operation of aircraft' or 'operate aircraft'" in the Civil Aeronautics Act of 1938, otherwise the 1948 amendment would have been unnecessary. The difficulty with petitioners' argument is that its premise is mistaken; a correct quotation of the 1948 amendment, together with its legislative history, shows that what the amendment was directed to was not any alleged *federal* vicarious liability, but, rather, the *state* vicarious liability which is imposed by *state* statute in the states which have adopted § 5 ("Damage to Land") of the Uniform Aeronautics Act.

The 1948 amendment, now *49 U.S.C. § 1404*, reads in its entirety as follows:

> "No person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft, aircraft engine, or propeller under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft, aircraft engine, or propeller so leased, for any injury to or death of persons, or damage to

> or loss of property, on *the surface of the earth* (whether on land or water) caused by such aircraft, aircraft engine, or propeller, or by the ascent, descent, or flight of such aircraft, aircraft engine, or propeller or by the dropping or falling of an object therefrom, unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage, or loss." (Emphasis added.)[*]

It is thus seen that the 1948 amendment does not grant security owners any relief from liability to passengers in the mortgaged aircraft, the exemption is only from liability for damage caused by the aircraft "*on the surface of the earth.*" Petitioners might have been more conscious of this limitation if, when quoting the statute to this Court (Petition for Writ of Certiorari 9), they had not placed three stars at the point in the statute where the words "on the surface of the earth" appear.

When the 1948 amendment is correctly quoted, however, and when we recall the provisions of § 5 of the Uniform Aeronautics Act (quoted at p. 6 hereof) and consider the background of the 1948 amendment, the purpose of that amendment becomes quite clear. With the enormous development of aviation after World War II, banks and other lending institutions were anxious to finance purchases of aircraft, but they were concerned that a lender who retained any security interest in an aircraft might be regarded as an owner of the aircraft, subject to the absolute liability for ground damage which is imposed on aircraft owners by § 5 of

[*]The references to aircraft engines and propellers were added in 1959. See pp. 19 to 22 of this Brief.

the Uniform Aeronautics Act. The 1948 amendment was enacted to remove this obstacle to the financing of aircraft.

This purpose, indeed, is made plain by the House Committee Report on the 1948 amendment, only a part of which Report is set out on pp. 9-10 of the Petition for Writ of Certiorari. After the language relied upon by petitioners, the Report quotes § 5 of the Uniform Aeronautics Act, recites that § 5 is "in force in at least 10 states and Hawaii," and goes on to explain:

> "This provision thus imposes absolute liability on owners of aircraft for damage caused on the surface of the earth. It is susceptible of a construction which would impose liability upon any person registered as owner, even though he holds title only as security under a mortgage or similar security instrument or as lessor under an equipment trust. If such interpretation were adopted, the security title holder could become liable for extensive damages on the surface caused by the operation of the aircraft. An owner in possession or control of aircraft, either personally or through an agent, should be liable for damages caused. A security owner not in possession or control of the aircraft, however, should not be liable for such damages. This bill would make it clear that this generally accepted rule applies and assures the security owner or lessee, that he would not be liable when he is not in possession or control of the aircraft."

The Report concludes:

> "• • • It is the conviction of the committee that the bill should be passed to remove one of

> the obstacles to the financing of purchases of new aircraft." House Report No. 2091, U.S. Congressional Code Service, 80th Congress, 2nd Sess., pp. 1836, 1837 (1948)."

Now, if as petitioners contend, the Civil Aeronautics Act of 1938 had imposed federal vicarious tort liability upon aircraft lessors, that liability would not be limited to damages on the surface of the earth, it would cover injury to or death of passengers as well; and, certainly, no one would deny that the threat of vicarious liability for passenger injury or death would be at least as serious an "obstacle to the financing of purchases of new aircraft" as the threat of liability for ground damage. The 1948 amendment, however, attempting to remove such obstacles, only grants relief from liability for ground damage. There can be but one reason. Congress did not consider it necessary to grant security owners any relief from vicarious liability for passenger damage, because it knew that no such liability existed —either under state common law, or under the Uniform Aeronautics Act (see § 6, quoted at p. 6 hereof), *or under federal statute*. Congress felt that the only threat of such liability lay in the liability for ground damage imposed by the statutes of those 10 states which had adopted § 5 of the Uniform Aeronautics Act. Indeed, when the 1948 amendment reached the

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"The reason the 1948 amendment exempts leases under leases "of thirty days or more" is that leases are sometimes executed in connection with financing arrangements and such a lease "would almost certainly be" for thirty days or more. *Ibid.*

floor of the Senate, the following took place just before it was passed:

> "Mr. CORDON. Mr. President, may we have an explanation of the bill?
>
> "Mr. BREWSTER. Mr. President, at the present time there is some question whether, *under the laws of 10 States*, one who has a mortgage on an airplane may not be liable for damages in the case of an accident or collision. Such liability seems entirely unwarranted, and the purpose of the bill is to protect such persons." *93 Cong. Rec. 6307 (1948)*, emphasis added.

If there could be any doubt about the matter at all, it is fully dispelled by action which Congress took in 1959. As planes became larger and more expensive, it became customary to finance aircraft engines and aircraft propellers separately from the aircraft itself, so, in 1959, a bill was introduced to amend the 1948 amendment to extend its protection to security holders and lessors of aircraft engines and propellers. On that occasion, General Aircraft & Leasing Co. proposed that, in addition, the 1948 amendment should be amended to grant relief from vicarious liability for passenger damage as well as ground damage. The Senate Committee on Interstate and Foreign Commerce referred the suggestion to the Federal Aviation Agency and received an opinion, dated April 16, 1959, from Mr. E. R. Quesada, the Administrator.

The opinion observed that the purpose of the 1948 amendment (then known as Section 504) had been:

> "• • • to assure that the holder of a security interest would not be subjected to absolute liability

> solely by virtue of such security interest under section 5 of the Uniform Aeronautics Act, which has been adopted by some jurisdictions."

The opinion went on to point out that, "absent a specific statute," the general rule is that the owner of a vehicle is not liable for the negligence of the bailee. Finding no such statute applicable to passenger damage, the opinion concluded that there was "no evidence of a present threat" that vicarious liability would be imposed on a security holder for such damage, and, accordingly the Agency recommended against adoption of General Aircraft & Leasing Co.'s proposal.[*]

In accordance with the Agency's opinion, the Senate Committee reported out the bill, with the amendment extending protection to security owners of engines and propellers, but without removing the limitation as to ground damage. The Senate Report recommending the bill for passage, read in pertinent part as follows:

> "Section 504 was added to the original Civil Aeronautics Act in 1948 (62 Stat. 470) to overcome the possible adverse effect on security owners *of various State statutes making an aircraft owner or operator absolutely liable for any damage caused on the ground by the aircraft.* Its purpose was to assure that liability *under such laws* would not attach to the holder of a security interest solely by virtue of that interest * * *. [I]t is logical that the protection afforded to security owners of air-

[*] The F.A.A. opinion may be found at pp. 29-30 of the transcript of March-April 1959 hearings of the Aviation Subcommittee, Senate Committee on Interstate and Foreign Commerce, on "Financing of New Jet and Turboprop Aircraft." The opinion was included in full as an appendix to our "Appellants' Reply to Brief for Appellees" in the Fifth Circuit.

craft by this section of the act should also be given to those having a separate security interest in engines and propellers." *Senate Report No. 221, 86th Cong., 1st Sess (1959)*, emphasis added.

The House Report on the bill read in pertinent part as follows:

> "As presently written, the effect of section 504 is to relieve any person having a security interest in an aircraft • • • from any liability he might have by reason of such interest *for injury or damage on the ground* caused by the operation of the aircraft, unless such aircraft is in his actual possession or control. Unless section 504 is amended to extend to persons holding security interests in aircraft engines and propellers the same limitation of liability now extended to those holding similar interests in aircraft, the former cannot be assured of exemption from liability for *damage on the surface of the earth* caused by the operation of the aircraft in which the aircraft engine or propeller is installed." *House Report No. 455, U.S. Code Congressional and Administrative News, 86th Cong., 1st Sess., 1762, 1763 (1959)*, emphasis added.

Congress passed the 1959 amendment to *49 U.S.C. § 1404* without deleting the "surface of the earth" limitation. The limitation is in the statute today.

So, far from supporting petitioners' theory, the 1948 and 1959 amendments, *49 U.S.C. § 1404*, destroy it. Those amendments show that Congress did not consider that the field of aircraft bailor liability had been federally preempted; by enacting the amendments, Con-

gress recognized that such field has been left to the states. That is the reason Congress enacted the 1948 and 1949 amendments—to exempt security owner-lessors from the ground damage liability imposed by state laws. Moreover, those amendments show that Congress did not consider that there is any federal law imposing vicarious liability on bailors for passenger damage; otherwise, Congress would surely have relieved security owners from that liability in the 1948 and 1949 amendments and would not have limited those amendments to the granting of relief from liability for ground damage. From the enactment of the statute in 1938, through the 1948 and 1949 amendments, and to the present day, the legislative history of the Civil Aeronautics Act-Federal Aviation Act in every respect confirms the Fifth Circuit's refusal to accept petitioners' theory.

C. The Cases

The language, context, and legislative history of the definition being so squarely against them, petitioners' most heavily emphasized argument is that this Court should grant certiorari in order to rule that petitioners' theory has been accepted by precedent. (Petition for Writ of Certiorari 5, 10-15.) Petitioners' cases, however, do not sustain their position. In none of them was the court required to rule upon the issue here presented—whether definition no. 26 in the Federal Aviation Act does place vicarious liability upon aircraft bailors.

Petitioners' primary reliance is upon an earlier decision of the Fifth Circuit, *Hays v. Morgan*, 221 F. 2d 481 (5 Cir., 1955). There, the court had before it *Miss. Code*, 1942, § 7536-26 (9), which adopts "for the purpose of the laws of this state relating to commerce" the same definition of "'operation of aircraft' or 'operate aircraft'" that appears in the Federal Aviation Act, and *Miss. Code*, 1942, § 7536-12, which makes it unlawful for any person to operate an aircraft in a "careless or reckless manner." 221 F. 2d 482. The plaintiff, while standing on the ground, was struck and seriously injured by a negligently operated plane which was being used for crop dusting; the Fifth Circuit allowed plaintiff recovery against the owner of the plane, who was not the pilot. While it would seem from the opinion that liability of the owner could have been upheld on the basis that the pilot was his agent, the opinion also ruled that the owner, by virtue of the definition, *Miss. Code*, 7536-26(9), was deemed to be operating the aircraft himself "within the meaning of the statutes of Mississippi," and, as, was liable for the pilot's negligence. To the same effect are decisions of the New Hampshire and Iowa Supreme Courts, construing the statutes of their respective states. *Hoehoe v. Howe*, 98 N.H. 168, 97 A. 2d 232 (1953); *Lamasters v. Snodgrass*, 249 Iowa 1377, 85 N.W. 2d 622 (1957)."

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[3] In the other state law case relied upon by petitioners, *Ross v. Apple*, 249 N.W. 2d 855 (Ind. App., 1956), an Indiana appellate court was asked to determine the effect of the Federal Aviation Act upon Ohio law, but it refused to rule on the question and returned the case to the trial court for further evidence. The court suggested, curiously, to regard the issue as one of fact rather than of law.

These decisions are fully discussed at pp. 7-10, 11 of the opinion below. We only add that these cases were not concerned with the intent of Congress, and any expressions therein about such intent are dicta; all that was before these courts was the intent of state legislatures. It is not necessary, therefore, to agree or disagree with the holdings in these cases. It may well be, as *Hays*, *Hooker*, and *Lamasters* say, that the legislatures of Mississippi, New Hampshire, and Iowa, by copying the definition of "'operation of aircraft' or 'operate aircraft'" for use within the meaning of their own state laws, did in fact intend to overturn their common law and establish, for themselves, a state statutory rule of vicarious bailor liability. That, however, is no evidence that Congress, by enacting the original definition for use within the meaning of an administrative and regulatory statute, has "clearly manifested" an intent to preempt the statutory and common law of *all* states and impose upon *all* states a federal rule of vicarious bailor liability, notwithstanding the many state statutes and rules of decision to the contrary.

If state statutes and cases are to be considered as indicative of congressional intent, the decision most closely in point is *Haskin v. Northeast Airways, Inc.*, *266 Minn. 210, 123 N.W. 2d 81 (1963)*. In 1943, Minnesota enacted an administrative and regulatory statute establishing and fixing the duties of a department of aeronautics; regulating airports, approaches, and the licensing of pilots; and forbidding stunt flying. The

statute contained the same definition of "'operation of aircraft' or 'operate aircraft'" which appears in the Federal Aviation Act and in the Mississippi, New Hampshire, and Iowa statutes. Since 1929, however, Minnesota has had a statute adopting § 6 of the Uniform Aeronautics Act, which, as we have seen (pp. 5 to 6 of this Brief), codifies the common law rule that the bailor of an aircraft is not liable to passengers therein for the negligence of the bailee. In *Haskin*, a suit by an injured passenger against the bailor, it was contended that the definition in the 1943 statute had established vicarious bailor liability for Minnesota, repealing § 6 of the Uniform Aeronautics Act. The Minnesota Supreme Court rejected that contention. Noting that when the Minnesota legislature has intended to impose vicarious liability, it has done so in plain language," the Court held that the definition simply made the bailor responsible for compliance with the 1943 statute. *123 N.W. 2d 84.* The Court refused to hold that the Minnesota legislature intended for the definition to "render the civil liability section of our statute a nullity." *123 N.W. 2d 85.* The same reasoning reinforces the Fifth Circuit's holding that the definition in the Federal Aviation Act applies, as it says, only within the meaning

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"The Court noted:

> "Minn. St. 170.54 provides: 'Whenever any motor vehicle . . . shall be operated upon any public street or highway of this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.'" (123 N.W. 2d 85.)

of that Act, and its refusal to hold that Congress intended for the definition to "render * * * a nullity" the common law rule in virtually all the states and the civil liability statutes in those 22 states in which § 6 of the Uniform Aeronautics Act was the statutory law.

Other than the instant decision, the only federal case which has ruled on the issue now before the Court is *Rosdail v. Western Aviation, Inc., 297 F. Supp. 681 (D. Colo., 1969).*" After a most thorough and scholarly discussion, Chief Judge Arraj determined, in *Rosdail*, that the responsibility placed upon bailors by *49 U.S.C. § 1301 (26)* "arises merely in the context of violations of the [Federal Aviation] Program and regulations promulgated pursuant thereunder." Of petitioners' theory of recovery, Judge Arraj said:

> "[T]here is a paucity of reasoning to explain how Congress intended to change the legal relationships of owners and bailees, with respect to actions under state law for the recovery of damages in tort, by a definitional section to a regulatory statute which section states that an owner is deemed to be an operator *for the purposes of this chapter* (referring to the Federal Aviation Program)." (297 F. Supp. 687, emphasis the court's.)

Therefore, Judge Arraj concluded:

> "[W]e do not find that Congress intended to replace the legal relationships created by state

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"In *Sees v. Young Flying Service, 277 F. Supp. 554 (S.D. Tex., 1967)*, the parties and court *assumed* that the Federal Aviation Act establishes a federal rule of absolute liability on the part of bailors. All the court held was that such rule would apply to intrastate as well as interstate flights.

> common law or statute with respect to tort liability, with the relationship as stated in § 1301 (26) of the Federal Aviation Program." (Ibid.)

The Fifth Circuit in our case agreed with the reasoning and result of *Rosdail*. (Opinion 9-10.)

Thus, petitioners cannot even claim any conflict between the circuits. *Cf. Rule 19(b), U.S. Supreme Court Rules.* The federal cases on the point are in accord and, we submit, are unassailable.

D. Public policy

Finally, petitioners argue that if Congress did not preempt the field of aircraft bailor liability by a definition in the Federal Aviation Act, then Congress ought to have done so. Petitioners say that since "most aircraft renters do not carry liability insurance covering the renter pilot," then federal preemption must be invoked to prevent "thousands of financially irresponsible pilots" from "endangering the lives and property of the public each day." (Petition for Writ of Certiorari 16.)

Not knowing where petitioners got their information about "most aircraft renters" (certainly not from anything in the record of this case), and unaware of any statistics which would indicate that lessees of private planes, as a class, are "financially irresponsible," we are unable to join petitioners in their alarming vision of thousands of financially irresponsible pilots hurtling through the air if the matter of bailor liability is left

to the states. We suggest that the specter thus raised by petitioners is indeed insubstantial. Of far greater and more immediate concern is the confusion and uncertainty which would result if the courts should depart from the settled rule that a congressional intent to preempt state laws must be "clearly manifested," *Reid v. Colorado, 187 U.S. 137, 148 (1902)*, and thus find preemption of state tort laws in a definition in a regulatory statute by means of "the circuitous reasoning plaintiffs find themselves driven to employ." (Opinion 8.)"

It may be that, at some future date, Congress will decide that the states no longer can be trusted to evaluate such matters as the relative financial responsibility of aircraft bailors and bailees, and that, accordingly, Congress will withdraw this field of tort liability from the states and establish its own rules of aircraft bailor liability. Congress has not done so yet, however; and we are confident that if and when it does take such a drastic step, it will not rely upon a definition in a regulatory statute, but will make its intention known

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"At Footnote 9, at p. 10 of the opinion below, the Fifth Circuit says that we allege that petitioners' preemption argument would "alter the law of some eighteen states." This makes petitioners' argument sound far less drastic than it actually is. What we meant to say is that the argument would alter the *statutory* law of the eighteen states in which § 6 of the Uniform Aeronautics Act is in effect. Also, it would nullify the Rhode Island Statute, *Rhode Island Gen. Laws, § 1-4-3*, which enacts a rebuttable presumption that the owner was negligent even though not present in the aircraft, and the California statute, *California Pub. Util. Code, §§ 21404, 21404.1*, which provides for absolute liability of an aircraft owner but with limitation as to amount, and the law of the many other states which, having no statute on the subject, would follow the common law rule that the bailee's negligence is not imputed to the bailor.

in "clear and manifest" language—and will be impelled by considerations of far greater significance than the unsubstantiated allegations at Petition for Writ of Certiorari 16.

CONCLUSION

The Fifth Circuit was entirely correct in refusing to accept the tortured reasoning by which petitioners claim a federal intention to preempt state bailment rules through a definition in a regulatory statute. Petitioners have shown nothing, and there is nothing, that could begin to justify review of this damage suit by the Supreme Court of the United States. The judgment of the Fifth Circuit was right, and certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jack Pew, Jr., one of the Counsel for Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of February, 1971, I served a copy of the foregoing Respondents' Brief in Opposition by mailing a copy in a duly addressed envelope, with first class postage prepaid, to James C. Cole, Phelps Building, Malvern, Arkansas, and Tom H. Davis, 214 Austin National Bank Building, Austin, Texas, Counsel for Petitioners.

Jack Pew, Jr.